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OF THE

Supreme Court of the United States

OCTOBER TERM, 1921.

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No. 22, Original.

THE STATE OF GEORGIA

Complainant

vs.

THE STATE OF SOUTH CAROLINA

Respondent

BRIEF FOR THE COMPLAINANT.

✓ GEO. M. NAPIER,
Attorney General;

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Assistant Attorney General;

✓ THOS. F. GREEN,
Special Counsel.

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Of Counsel.

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This is a complaint brought by the State of Georgia against the State of South Carolina as an original cause of action in the Supreme Court of the United States, filed in this Court according to the well recognized procedure permitted in such cases.

Georgia, in her bill of complaint, paragraph two, shows that the legislative branch of the State passed a Resolution requiring the Governor of said State "To institute a suit or suits in the Supreme Court of the United States by and in the name of the State of Georgia, against the State of South Carolina, for establishing the claim and boundary of Georgia to and including

the entire bed of the Savannah and Tugalo Rivers in their entire lengths, islands and all, clear over to the South Carolina shore at the ordinary mean-water level of said Rivers, and to prosecute for and recover the same wherever any adverse occupancy does or may exist."

In accordance with this Resolution of the legislature, the above suit was duly filed and service perfected. It might not be amiss here to state that this suit was not brought merely to again agitate the old boundary dispute between the two States, but was brought because an intensely practical question had arisen which involved the boundary between the two States, and which question demanded a settlement not only to definitely determine a present controversy, but for the purpose of preventing similar controversies in the future.

The Georgia Railway & Power Company, a corporation of the State of Georgia, had erected a large dam across the Savannah River and anchored it to an Island near the South Carolina shore. The dam, with its machinery, was quite valuable, and was used for the development of hydro-electrical power. The State of Georgia claimed that this property was within the State, and subject to taxation. The corporation replied that the dividing line between the State of Georgia and South Carolina was the middle of the stream and that a good portion of the dam, with its machinery, was beyond the middle of the river, within the jurisdiction of the State of South Carolina, and, therefore, not subject to taxation in the State of Georgia. Litigation arose as a result of these respective claims, which will be later referred to in the brief, and the legislative branch of the Government then requested the bringing of this suit in order that the boundary be-

tween the two States might be accurately determined in reference to this dispute and similar disputes which might arise in the future.

As is well known, a dispute as to the boundary between these two States is a very old one, and though the well-known Convention of Beaufort was held in April, 1787, in order to settle this question, there has remained a distinct impression in the State of Georgia that this Convention did not definitely settle this question and much discussion has been engaged in between the two States as to this boundary, particularly in the years 1852 and 1853.

Some very reputable authority could be cited in the State of Georgia going to show that the line was not the true line as originally existed between these two States. For instance, one of the old Digests of the States, known as Schley's Digest, contains what purports to be an exact reproduction of the original charter of the Province of Georgia, and on pages 435 and 436 of this Digest there purports to be an accurate description of the territory which was allotted to the Province of Georgia, and in this description we find these words: "*Of all those lands, country, and territories situate, lying and being in that part of South Carolina, in America, which lies from the most northern part of a stream or river, there commonly called the Savannah.*"

Governor Cobb, in the year 1852, made quite an argument as to the boundary between the two States, basing his argument largely on the original wording of the charter, which he claimed was correctly printed in Schley's Digest. Governor Cobb's argument was to the effect that as the Province of Georgia extended from

the *most northern part* of a stream or river known as the Savannah, that this fixed the Northern or Eastern embankment of the River as the dividing line between the two States, and that, therefore, the State of Georgia owned the entire bed of the Savannah River.

As the legislature authorized and directed the bringing of such a suit, the Governor of the State of Georgia directed counsel to file the suit accordingly, and hence the suit was brought as appears in the record from pages 4 through 9.

It might be interesting to here note that there seemed to be nowhere in either South Carolina or Georgia, or elsewhere in America, so far as counsel could ascertain, an authenticated copy of the original charter, or letters patent, to the Province of Georgia, and though this controversy in reference to the boundary had been raging for over a century, no one seemingly had made an effort to procure such a copy. Counsel for the State of Georgia communicated with the proper authorities in England and have received a properly authenticated copy of the original charter, from the Patent Roll (Chancery), London, England, which charter appears on pages 29 through 42 of the record. A reading of this charter will show that Schley's purported copy of the Charter is not correct, and that the correct language is: "Of all those lands, countries, and territories, situate, lying and being in that part of South Carolina, in America, which lies from *the most northern stream of a river there commonly called the Savannah,*" etc.

In other words, the disputed words are "*the most northern part of a stream or river.*"

Counsel, by further investigation in England, satis-

fied themselves that this was the correct language of the original charter and hence this disputed point is now settled.

Again, although the suit as originally filed in this Court was based on what was thought to be the wording of the original charter and took no notice of the Convention of Beaufort, after careful investigation counsel for the State of Georgia must admit that this pact between the two States, ratified by both States by legislative enactments, and accepted by the Congress of the United States, was an agreement between the two States as to the boundary and must be recognized as such. Counsel, therefore, do not now insist that the State of Georgia can successfully claim the entire bed of the river, but they do claim that the Treaty of Beaufort, as it is commonly known, must be interpreted and directly applied to the practical question in controversy which has arisen in the past and which will doubtless arise in the future.

This difference in the verbiage impels counsel for the State of Georgia to modify their contentions as to the exact boundaries, so far as the *waters* of the stream is concerned; and, in all sincerity and in frankness with this Honorable Court, said counsel recede from the claim to the *entire waters* of the Savannah and its tributaries along the boundary between the States of Georgia and South Carolina, and do and shall contend only for the boundary described and made effective by the terms found actually expressed in said original grant, which are as follows: to-wit: "to the most northern stream of the river called the Savannah, etc."

Both the contention of Plaintiff's petition and the ad-

missions contained in defendant's answer show that, without controversy, all the islands in the rivers Savannah and Tugaloo are the right and property of the State of Georgia.

As will be set forth at some length in the brief, counsel now insist, in accordance with the original charter given to the State of Georgia, and in accordance with the boundary determined at the Convention of Beaufort, that the true line between the two States is midway between the two embankments of the Savannah River where this River is not broken by Islands, and, where it is broken by Islands, this line deflects and follows midway the most northern stream of this river between a given island and the South Carolina shore; this line being drawn in this manner up the Savannah, the Tugaloo and the Chattooga Rivers until the Chattooga River intersects the northern boundary of South Carolina at the 35th line of North latitude.

Various historical records have been introduced and are in the record, all of which documents are well known to the Court, and of which judicial cognizance would have been taken. At this late day, and in this practical age, these documents are only necessary to elucidate a few points in this discussion, and counsel will briefly refer to these documents in the brief of law.

BRIEF OF LAW AND ARGUMENT.

1.

The State of Georgia first submits that where two independent States are separated by a navigable stream, each State holds to the middle of the stream. This principle is so ancient, and of such universal application, that it scarcely needs a citation of authority, but the Supreme Court of the United States, in its early history, adopted this rule in the following language:—

“Where a river is the boundary between two nations or States, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream.”

Handy vs. Anthony, 5 Wheaton, 374; 5 Law Ed., 113.

This rule, so far as counsel are informed, has never been criticized or questioned, except as to whether the line should be the *filum aquae*, a point midway between the two great embankments of the stream, or whether it should be the middle of the main navigable channel of the stream without regard to the embankments of the entire river. This question has been raised for the reason that the courts have said in some cases that the main navigable channel of a stream might be near the shore of one State and far removed from the other, and in such a case it would not be fair to take the *filum aquae* as the dividing line, and thereby deprive one State of the navigation of the river and that in such a case the fairer rule would be to make the dividing line the middle of the main channel so that each State would have the right of navigation, rather than the middle of the stream as measured from bank to bank.

It is needless to pursue this inquiry further, for the Convention of Beaufort undertook to settle both the question of boundary and of navigation. Article 1 deals directly with boundary; Article 2 with navigation, and since independently of the question of boundary the right of navigation and the line of navigation are distinctly set forth as to both States, the ancient rule would apply and a line midway between the two shores would be the boundary line unless changed by the Convention.

II.

Next, before proceeding to a discussion of how far this well established rule as to boundary may have been modified by the Convention held at Beaufort, the State of Georgia desires to submit that this rule is controlling in this case unless qualified by said Convention, and is not affected by that other rule, which is as follows:—

“When one State is the original proprietor and grants the territory on one side only of a river, it retains the river within its own domain and the newly created State extends to the river only.”

Counsel for the State of South Carolina refer to this rule in their brief, and rather seem to invoke the rule, although other portions of their brief do not seem to insist on it. Counsel for the State of Georgia respectfully insist that this rule, though recognized, is not applicable to this controversy for two reasons:

First: Whereas, it is historically true, as is well known, and as is shown by the documents compiled in the record, that the Province of South Carolina originally embraced the Province of Georgia, yet it is as well known that there has been a discussion as to whether or

not the original letters patent to South Carolina established a Proprietary Grant or a Royal Grant. Counsel for the State of Georgia are of the opinion that this original grant was a Royal Grant under which the King reserved full authority to re-grant, at his pleasure, portions of the original territory. However, it is needless to pursue this question, for the very good reason that the original Province of South Carolina was divided into the Provinces of North Carolina and South Carolina, and one of the original eight proprietors took North Carolina and the seven remaining proprietors received the Province of South Carolina. Later, in 1729, these seven Lords Proprietors distinctly surrendered their title and interest in the Province of South Carolina to His Majesty, the King, as is positively shown by "an Act for establishing an agreement with the seven Lords Proprietors of Carolina for the surrender of their title and interests in that Province to His Majesty," which act is found in the record on pages 70 through 83, and which Act was placed in the record by the State of South Carolina herself.

Then there will be found in the record the original Charter of June 9, 1732, granted by King George II, to certain parties establishing the Province of Georgia, which Charter appears in the record on pages 29 through 42. These documents clearly establish that though the territory of Georgia was at one time included within the territory of South Carolina, the Lords Proprietors surrendered this territory to the Crown and the Province of Georgia received its Charter directly from His Majesty, King George II. This unquestionably eliminates the rule above announced from this discussion.

Second: The Treaty of Beaufort takes up this question somewhat as an original question recognizing, of course, the respective Charters of the States in a measure, and then absolutely establishes the boundary between the two States except as therein qualified.

III.

Counsel for the State of Georgia have now reached a discussion of the Treaty of Beaufort and it simply remains to apply this pact, in a practical way, to the situation as it exists in the Savannah and other rivers. Article first of this Treaty is as follows:—

“The most northerly branch or stream of the River Savannah, from the sea, or mouth, of such stream to the fork or confluence of the rivers now called Tugaloo and Keowee; and from thence, the most northern branch or stream of the said River Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said Rivers Savannah and Tugaloo to Georgia; but if the head spring or source of any branch or stream of the said River Tugaloo does not extend to the northern boundary line of South Carolina, then a west line to the Mississippi, to be drawn from the headspring or source of the said branch or stream of Tugaloo, which extends to the highest northern latitude, shall forever hereafter form the separation, limits and boundary between the States of South Carolina and Georgia.”

At the time of this Convention it was not known

whether the northern branch of the River Tugaloo extended to the northern boundary line of South Carolina or not, but that fact is now well established and not questioned by South Carolina. It is well known now that the Chattooga River is the northern branch of the Tugaloo and does intersect the northern boundary line of South Carolina at the thirty-fifth degree of North Latitude. Making the necessary changes, the boundary as established by this Convention is beyond all question as follows: The most northern branch or stream of the River Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugaloo and Seneca, and from thence the most northern branch or stream of the River Tugaloo until it intersects with the Chattooga; thence along this river, the Chattooga, till it intersects the northern boundary line of South Carolina, reserving all the islands in the said Rivers Savannah, Tugaloo and Chattooga to Georgia.

Counsel repeat that by making the necessary changes, as well recognized, this is the exact boundary as established by the Convention of Beaufort. This is the exact boundary for which Georgia is contending today, and she simply desires that this Honorable Court, in a definite way, make an application of this boundary to these rivers as they flow to the sea.

IV.

Counsel further insist that South Carolina herself, with one modification, recognizes this as the true boundary line today.

Code of Laws of South Carolina, 1912, Vol. 1, Section 1, as appears on page 42 of the record is as follows:—

"From the State of Georgia, South Carolina is divided by the Savannah River, from its entrance into the ocean to the confluence of the Tugaloo and Seneca Rivers; thence by the Tugaloo River to the confluence of the Tugaloo and Chattooga Rivers; thence by the Chattooga River to the North Carolina line aforesaid, in the thirty-fifth degree of North latitude, the line being low-water mark at the southern shore of the most northern stream of said rivers where the middle of the river is broken by islands, and middle thread of the stream where the river flows in one stream or volume. Also see Revised Statutes of 1893, Sec. 1."

The Court's attention is specially called to these words: "The line being low-water mark at the southern shore of the most northern stream of said rivers, where the middle of the river is broken by islands, and middle thread of the stream where the river flows in one stream or volume." This section of the Code of South Carolina clearly established the middle thread of the river measured from bank to bank as the dividing line between the two States, where the river is not broken by islands, and where the river is broken by islands the Code admits that the northern channel is the boundary line, but instead of following the middle of this channel, South Carolina claims to the southern shore of the most northern stream, which, of course, is the stream running around the island between the island and the South Carolina shore. This is the crux of the entire matter, and this is the point which the State of Georgia submits to this Court for decision. The State of Georgia insists that this last line,

instead of being the southern shore of the most northern stream, should be the middle of this stream, as measured from the northern or eastern shore of the island to the southern or western shore of South Carolina. The State of Georgia earnestly contends that this is the only fair, sensible interpretation of the Treaty of Beaufort, and such an interpretation would result in a direct application of that ancient rule of boundary which is invoked in the first section of this brief.

In accordance with this principle is the admission contained in Defendant's answer (*See paragraph 25 of the report, at page 16*):

"That the boundary line between the State of Georgia and the State of South Carolina has accordingly been from said date of the ratification of the Beaufort Convention recognized and acquiesced in by the State of South Carolina and the State of Georgia as follows: From the most northern stream or branch of the river known as the Savannah at its entrance into the ocean to the confluence of the Tugaloo and Seneca (formerly Keowee), reserving all the islands in the said Rivers Tugaloo and Savannah River to Georgia, and from the confluence of said Tugaloo and Seneca Rivers up the most northern branch or stream of the said Tugaloo River, namely, the Chattooga River, to the North Carolina line on the 35th degree of North latitude, the line being low-water mark at the southern shore of the most northern stream of said rivers where the middle of the river is broken by islands, and the middle thread of the stream where the river flows in one stream or volume."

Note that Defendant claims, however, to the *northern shore* of the islands. This would give South Carolina all of the water next to her mainland. The authorities uniformly fix the boundary at *medium filum* between that mainland and the island owned by another party.

It is clear that all the islands are given to Georgia under the Treaty of Beaufort. It is likewise clear that the Commissioners at this Convention made a direct application of that established rule as to boundaries, to-wit: the middle of the stream, and it is equally clear that where the river is broken by islands the measurement should be made from the middle thread of the branch or stream between the South Carolina shore and island, and not from the mainland of the Georgia shore to the South Carolina shore.

The Court can see in an instant what an absurd situation would arise if this latter measurement were adopted. In a given case, if an island were far beyond the thread of the stream near the South Carolina shore, and the measurement was made from the Georgia mainland to the South Carolina shore, Georgia would extend to the middle of the stream, and then you would have South Carolina territory, and then an island, Georgia territory, and then again South Carolina territory. Such a construction of the Treaty would grant to Georgia insular possessions in the Savannah River, and Georgia officers would have to go through South Carolina territory to serve process or to enforce the laws of Georgia. The Commissioners at Beaufort, counsel respectfully submit, did not intend to create any such absurd and anomolous situation, but their intention clearly was to give the intervening territory to Georgia and then take the north-

ern branch of the stream and make the dividing line between a given island, which is Georgia territory, and South Carolina, midway of this northern branch. In fact this is nothing but a clear interpretation and application of the exact language of the Treaty, for it says in express language, "that the most northern branch or stream of the River Savannah from the sea or mouth of such stream," etc., should be followed, and the stream which flows between an island and the South Carolina shore is certainly the most northern stream or branch of the river.

The provision as to navigation, as distinguished from the boundary, supports our contentions. The second article of the Convention of Beaufort provides:—

"The navigation of the River Savannah at and from the bar and mouth along the northeast side of Cockspur Island and up the direct course of the main channel along the northern side of Hutchinson's Island and from thence up the bed or principal stream of the said river to the confluence of the Rivers Tugaloo and Keowee, and from the confluence up the channel of the most northern stream of the Tugaloo River to its source and back again by the same channel to the Atlantic Ocean, is declared to be henceforth equally free to the citizens of both States, and free from duties, tolls, hindrances, interruptions, etc., attempted to be enforced by one State on the citizens of the others, and all the rest of the River Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia."

So we observe that the boundary line is the most northern branch or stream of said river; but so run as that it

will reserve all of the islands in the River to Georgia; *but the line of navigation is the principal stream of said river.* Obviously, if the intention had been that the right of navigation shall follow the boundary of the State, there would have been no necessity for this second article treating the boundary line as one thing and the channel of navigation as another thing. It would have been easy to say, if such had been the intention, that the right of navigation along said boundary shall be open and free. But the framers of the Treaty of Beaufort knew that the channel would run sometimes on one side of the boundary line and sometimes on the other, and, therefore, it was necessary to draw two sections, one defining the route or channel of navigation and the other defining the boundary, which would sometimes run along a stream of the river too small or shallow for navigation; and so the framers of that Treaty met the difficulty by inserting the two separate articles in the Treaty to cover the problem in each of these respects separately. In the one case when dealing with the question of navigation the language is "along the bed or principal stream" of the river "and back again by the same channel." But when dealing with the boundary, the language is "the most northern branch or stream of said river."

Counsel for South Carolina, however, submit that Georgia has adopted some other boundary than the one for which contention is now made. Such a contention cannot be sustained. It is true Georgia cannot claim the entire river beds of the respective rivers, and such a claim is not now made. A portion of section sixteen (16) of the Code of Georgia of 1910, which is the last codification of Georgia laws, is as follows:—

"From the sea, or mouth, of the River Savannah, along the stream thereof to the fork or confluence made by the Rivers Keowee and Tugaloo, and thence along said River Tugaloo until the fork or confluence made by the said River Tugaloo and the river Chattooga, and up and along the same to the point where it touches the northern boundary line of South Carolina and the southern boundary line of North Carolina, which is at a point on the thirty-fifth parallel of north latitude, reserving all the islands in said Rivers Savannah, Tugaloo and Chattooga to Georgia."

Section seventeen (17) is as follows:—

"The boundary between Georgia and South Carolina shall be the line described as running from the mouth of the River Savannah, up said river, and the Rivers Tugaloo and Chattooga, to the point where the last named river intersects with the thirty-fifth parallel of north latitude, conforming as much as possible to the line agreed on by the Commissioners of said State at Beaufort on the 28th day of April, 1787."

These Code sections are in the language of previous Codes and Constitutions of the State of Georgia.

It is noticeable that, whereas the Convention of Beaufort and the Codes and Constitutions of Georgia establish a boundary, these authorities do not establish an exact boundary *line*. However, it is equally clear that an application of that well established rule, heretofore adverted to, will and does establish such a *line*, and it is *the line* now contended for by Georgia.

Counsel for the State of South Carolina cite the two Georgia cases of: —

Simpson vs. The State, 92 Ga. 41.

James vs. The State, 10 Ga. Appeals, 13.

These cases do not militate in the slightest against the position which is now being taken, but simply hold that the Treaty of Beaufort established the boundary between these two States, and that the middle of the stream is the boundary line, but the question as to how the middle of the most northern branch of that stream is to be determined when the stream is broken by an island, is not involved in either case and in fact has never been involved in any case in Georgia, except as it may be involved in the case of the Georgia Railway & Power Company vs. Wright, to which case we will later call special attention.

A casual investigation of the Constitutions, Codes and decisions of Georgia will show that there is nothing in any of them to act as an estoppel or res adjudicata against the State so far as its present contentions are concerned.

VI.

Permit counsel for the State of Georgia to again suggest that, whereas, the boundary between the two States has been established and accepted by the States, this established boundary fails to indicate in exact terms an accurate *line* of separation between the two commonwealths.

It is in this special section of this brief that counsel wish to discuss with the Court this point in the case.

The point, though not decided in its entirety, has been practically decided by the Supreme Court of Georgia as follows:

"The general rule is that where a river is the boundary between two States, if the original property is in neither, and there be no convention respecting it, each State holds to the middle of the stream. The Beaufort Convention of 1787 settled the boundary line between the States of South Carolina and Georgia, which, according to that convention, is the most northern branch or stream of the River Savannah from the sea to the confluence of the Seneca and Tugaloo Rivers, etc., reserving all the islands in the rivers to Georgia. That part of the Savannah River which is broken by islands located between an island and the mainland, is within the jurisdiction and sovereignty of the State of Georgia, and a dam constructed across the river from an Island to the Georgia shore is subject to taxation in Georgia."

Georgia Railway & Power Company vs. Wright, Comptroller General, et al., 146th Ga., 29.

The above decision is remarkably clear and we desire to submit the following quotation from said decision:—

"The Savannah River is navigable a considerable distance from its mouth, and many islands are located within its waters. Its general direction is northwest or southeast. We recognize the general rule to be that when a river is in the boundary between two States, if the original property is in neither and there be no convention respecting it, each State holds to the middle of the stream. *Handly's Lessee vs. Anthony, 5 Wheat., 374 (5 L.*

Ed., 113). Our opinion is that the Beaufort Convention altered the general rule, in that portion of the river where there are islands. In the beginning of the description in the Beaufort Convention, on the hypothesis that the general course of the river was east and west, the boundary was given as "the most northern branch or stream of the River Savannah "from the sea." This language was used to fit the subsequent declaration, "reserving all the islands in the said Rivers Savannah and Tugaloo to Georgia." Giving effect to both phrases, the boundary line where there are no islands is the middle of the main current of the river, *but in that part of the river where there are islands the boundary line is the stream or fork of the river which lies between the islands nearest the South Carolina shore.* Not only is this a fair and proper interpretation of the Beaufort Convention, but if we give it a construction that the middle of the main current of the river in that part where there are islands is the dividing line between the States, we could reach the curious result that islands belonging to Georgia and within the jurisdiction of Georgia would be located within territory belonging to the State of South Carolina where the main current of the river is between the Georgia mainland and its island. Of course, the Commissioners never intended such an anomaly as this. . . . But we do hold that all the Savannah River where it is broken by islands, which is between the island and the Georgia shore, is within the jurisdiction and sovereignty

of Georgia, and all improvements constructed thereon are properly subject to taxation within this State. As to that part of the river which is not broken by islands, the middle thread is the boundary between this State and South Carolina, and it was that part of the river which was involved in the cases of:—

Simpson vs. The State, 92 Ga., 41 (17 S. E., 984) ;
22 L. R. A., 248; 44 Am. St. R., 75.

James vs. The State, 10 Ga. App., 13 (72 S. E. 600.)

and nothing held therein is in conflict with our present holding.”

It will be noticed that in this decision the Supreme Court of Georgia directly follows that great principle of law which is enunciated in the first section of our brief and also follows the exact terms of the Treaty of Beaufort, stating that the Treaty of Beaufort had only altered that ancient principle of law by following the northern channel of the river where it was broken by islands. The decision does not decide the exact boundary between a given island which is the territory of Georgia and the South Carolina mainland, but states that the exigencies of the particular case did not require that decision.

The above decision was not only unanimously concurred in by the Justices of the Supreme Court of Georgia, but said decision adopted and confirmed the decision of the arbiters, to whom this question had previously been referred, and whose award had been made by Judge George Hillyer, an eminent Georgia Jurist, from whose report we have derived valuable assistance.

Counsel, however, now submit that the very nature of the question, the boundary, must be one of three lines. Either the northern shore of the island, which would be the southern portion of the river, or the northern portion of the river, which would be the southern shore of South Carolina, or the middle of this northern stream. To submit this question is but to decide it. Whereas, the Code of South Carolina attempts to claim the southern shore of the northern stream as the boundary line, there is absolutely no authority for such a contention. The Treaty of Beaufort did not establish this as the line, but simply established the northern stream of the river, and in establishing the northern stream of the river clearly established it with full knowledge that according to the well established rule the thread of this northern stream would be the boundary. The Governor of Georgia was directed to claim the entire bed of the river, which would carry the State of Georgia to the extreme northern part of the stream or the southern shore of South Carolina. Counsel for Georgia frankly admit that there is no authority for any such contention, but that the only proper solution of this question is to apply the well established boundary rule and follow the thread of this northern stream. South Carolina has clearly admitted this and so far as counsel have been able to ascertain the claim to the contrary in the Code Section is supported by no principle and by no authority.

In 1852, when this question was being agitated by the Governors and Attorneys-General of the respective States, the Governor of South Carolina submitted this question in his message, November third, to the Committee on Federal Relations of the General Assembly of

South Carolina, and on pages 27 and 28 of the record will be found a joint resolution concurred in by both the Senate and House of Representatives on December 15 and December 16 respectively, 1852, the important portion of which resolution is in the following language, as appears on page 28 of the record:

"Resolved, that the boundary between South Carolina and Georgia, as defined in the Convention, concluded at Beaufort by the duly authorized Commissioners of the two States, on the 28th day of April, 1787, and subsequently ratified by the respective legislatures of these States, is the existing boundary between said States."

"Resolved, That the terms of the first Article of the said Convention construed by the undisputed principles of international and common law, fix, as the limit of the respective jurisdictions of the two States, the thread of the middle of the stream designated as their boundary; that is to say, *the thread, or middle, of the most northern branch or stream of the Rivers Savannah and Tugaloo, where these rivers have more than one branch or stream, and the thread or middle of these rivers where there is but one branch or stream.*" (Italics ours.)

The Court's attention is specially called to the last four lines in the above quotation, which are as follows:

"That is to say, the thread or middle of the most northern branch or stream of the Rivers Savannah and Tugaloo where these rivers have more than one branch or

stream, and the thread or middle of these rivers where there is but one branch or stream." (Italics ours.)

This language is so explicit that it is difficult to see how controversy can further be made.

In this connection counsel feel that it is most opportune to quote at some little length from the Argument of Attorney-General Hayne, as contained in his letter of August, 1852, to His Excellency, Governor Means, of South Carolina. Among other things, the Attorney-General said:—

"The only modification which these terms express in regard to the general presumption that the *filum medium aquae* constitutes the line of separation is, that "*the most northern branch or stream*" of the Savannah and Tugaloo, where *those rivers have more streams than one*, is substituted for the whole stream; leaving the presumption in full force and untouched, *where the Savannah River and Tugaloo has but one branch or stream*. To follow the *filum aquae* of the northern branches instead of that of the main channel will of course throw the islands, in all cases, upon the Georgia side of the line of boundary; and accordingly the islands are, in terms reserved to that State. It is obvious that the thread of the most northern branch being fixed as the boundary, South Carolina would, without other provision, be excluded from all participation, in the southern branches, which in some portions of the river, constitute the best and perhaps the only navigable channel. To provide against such result, the second article of the Convention declares as follows:

"The navigation of the River Savannah, at and from

the bar, and mouth, along the Northeast Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah to the upper end of the said Island, and from thence up the bed of principal stream of the said river, to the confluence of the Rivers Tugaloo and Keowee, and from the confluence up the channel of the most northern stream of the Tugaloo River to its source, and back again by the same channel to the Atlantic Ocean: It is hereby declared to be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hindrances, interruption or molestation whatsoever, attempted to be enforced by one State on the citizens of the other, and *all the rest* of the River Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia." (Watkins' Digest, Appendix, P. 754).

TERRITORIALY, then, South Carolina is, in effect, declared to be bounded by a thread in the middle of the stream, where there is but one stream, *but which thread, in the case of the intervention of islands, deflects towards her own shore, takes the most northern channel and excludes the islands*" (Italics ours).

This admirable argument of Attorney-General Hayne, made in 1852, is all that Georgia claims. This entire correspondence, with the letters of Attorney-General Hayne to Governor Means and to Governor Cobb is all of file in the State Capitol at Atlanta, Georgia, and must be in the archives of the State of South Carolina, at Columbia.

Counsel further submit that the above solution of this

question is sound, based on common sense, on principle and on authority. The State of South Carolina herself has clearly recognized this principle, as applied to private ownership, in the case of:—

McCullough vs. Wall, 4 Richardson's Law, P. 68;
53 American Dec., 715.

In this case there was a controversy between two persons as to where a line was in a river which separated the mainland of the respective owners. It was shown in this case that an island in the river belonged to one riparian owner rather than to the other and the court distinctly held as follows:—

"The question then, is whether the measurement to fix the boundary of plaintiff's rights should be from his bank to Hill Island, or to the other bank of the river. If the western margin of Hill Island belonged to another person, the exact boundary between that person and the plaintiff would be midway between the island and the western bank of the river."

"If that margin of an island which lies next to a riparian proprietor and on his side of the middle of the whole river, has been lawfully appropriated by another person, then such proprietor's boundary is the filum midway between his bank and the island" (Italics ours).

Counsel respectfully submit that South Carolina has adjudicated this case against herself.

The same principle is announced in the case of:—

Ludwig vs. Overly, 6 Ohio Circuit Court, Dec. 690.

An investigation of the facts in this case will show that the contention which is being made by the State of Georgia is sustained in the following language:

"Now, we suppose that the rule is well established that the riparian rights of Overly must be measured from Island No. 1; the riparian rights of the plaintiffs, of course, start from the mainland, which we name the peninsula. And we think it equally well established *that the center of the stream between the island and the peninsula* is to be the boundary line between the lands of the two parties. Under this rule, we have no question that the work that was being done by the Overlys at the time in question was upon the northerly side of this center line of the stream."

Many decisions could be cited to the effect that where the riparian owner is also the owner of an island, or islands, in the stream, the boundary would be the thread of the stream between the island, or islands, and the farther shore. For instance, Willow Bar Island, formed by accretion near the main channel of the Mississippi River, being determined as the property of Illinois riparian owners, the Court held that the "present center of the stream between Willow Bar Island and the Missouri Bank" was the boundary between the States of Illinois and Missouri.

Bellevue vs. Niedringhaus, 181 Ill., 439; 55 N. F., 184.

Warren vs. Mfg. Co., 86 Me., 32.

Hopkinson Academy vs. Dickinson, 9 Cush, 544.

Wiggenhorn vs. Kountz, 23 Neb. 690.

For a further application and adoption of this rule see:—

“Where the owner of the island also owns the mainland on one side of the stream, for hydraulic purposes, he is entitled to the entire natural flow of water in the channel on the side of the island on which he owns the mainland, and one-half of the flow in the opposite channel.”

West, et al, vs. Fox River Paper Co., 521 N. W. 803; 82 Wis., 647.

“When the island is appropriated the boundary is then midway between that and the mainland.”
5 Cyc., 902.

“Where an island is formed in the middle of a river, two streams are necessarily formed by the original river, dividing it into two branches; the island itself a bank of the stream on the one side, and the old bank on the mainshore forms the other.”

Angell, Law of Watercourses, Section 4 (e)
Chapter 1, page 6.

“If an island in a private river has been lawfully appropriated by another person, or reserved in a grant, the thread of the stream midway between the island and the fast land is the boundary of the adjoining owner’s title.”

Gould, The Law of Waters, 3rd Ed., 329.

By the Treaty of Beaufort all of the islands in the Savannah and Tugaloo rivers were conceded and admitted to belong to the State of Georgia. Therefore, where-

ever there is an island, the State of Georgia owns to, and the boundary between the two States is *medium filum aquae* between the several islands and the South Carolina shore.

VII.

There is just one other possible question which might arise in this case and, if it is practicable, counsel for the State of Georgia submit that it should be covered in the decree of the Court. If counsel for the State of Georgia are correct in defining the boundary line between the two States, the question might arise as to how the thread of the stream is to be determined in relation to the island, the South Carolina shore, and the main thread of the stream, where it is broken by islands.

To illustrate: In following a line up the thread of the stream midway between the two great embankments of the river an island arises in the river several hundred yards away. Should this line go up the thread of the stream, and then at right angles to the edge of the island and cross said island to the middle of the stream between the island and the South Carolina shore, or should this line, before it reaches the island, deflect from the thread of the main stream and follow the thread of the auxiliary stream, which runs around the island and empties into the main channel, following the thread of this auxiliary stream until it connects with the main flow of the river?

This does not seem to be a fanciful suggestion, but as this river develops, it may become another practical question.

This boundary question has been in dispute for so many years that if possible all conceivable questions should be settled in this decree.

Counsel for the State of Georgia believe that whenever the Savannah River presents the conditions above mentioned that it would be feasible to follow the deflecting line from the main stream around and between the island in question and the South Carolina shore, and submit that this is the true rule to be applied to all such situations.

In the light of the foregoing discussion and authorities counsel for the State of Georgia respectfully insist that the true boundary line between the two States of Georgia and South Carolina is up the most northern branch of the River Savannah from the sea, or mouth of such stream, to the fork or confluence of the Rivers Tugaloo and Seneca, midway between the opposite banks of said northern branch or stream, and when said stream is broken by an island or islands, then the line deflects from the thread of the main stream around said island, following a line midway between said island and the South Carolina mainland until this line again strikes the thread of the main stream at the junction of the auxiliary stream and the main flow of the Savannah River, and so on up the northern branch of the Tugaloo River and the Chattooga River until the latter river reaches the northern boundary of South Carolina at the thirty-fifth (35th) degree of North Latitude.

All of which is respectfully submitted.

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